



7565-01

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 524, 539, 577, 580, 581, 582, 583, 584, and 585

RIN 3141-AA47

Appeal Proceedings Before the Commission

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission (NIGC or Commission) promulgates this final rule to enhance and clarify appeal proceedings before the Commission. This final rule removes three parts concerning appeals, and adds a new subchapter concerning appeal proceedings before the Commission.

This final rule has six parts. First, the *Rules of General Application in Appeal Proceedings Before the Commission* define certain terms, set forth the burden of proof and standard of review, explain the content of a Commission decision, uniformly provide for resolution of an appeal if the Commission does not issue a majority decision, and clarify that an appeal of the Chair's decision for matters other than disapproval of a gaming ordinance does not stay the effect of that decision. Next, the regulations set forth rules for motion practice in appeals before the Commission. This part addresses: how an entity other than a tribe can request to participate on a limited basis in ordinance appeals; how parties file motions to intervene, to supplement the record, and for reconsideration; and how parties file motions before the presiding official. Following these two general parts, the regulations set forth more specific rules for the different types of appeals.

Rules for appeals of ordinance disapprovals, management contract approvals and disapprovals, appeals before a presiding official, and appeals before the Commission on written submission only, each have their own unique appellate procedures.

DATES: *Effective Date:* These rules are effective [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. *Applicability Date:* These rules apply to all Notices of Appeal filed after [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

The Indian Gaming Regulatory Act (IGRA or Act), Pub. L. 100-497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act established the Commission and set out a comprehensive framework for the regulation of gaming on Indian lands.

The Act gives the Chair the “authority to levy and collect appropriate civil fines, not to exceed \$ 25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of [the Act], any regulation prescribed by the Commission pursuant to [the Act], or tribal regulations, ordinances, or resolutions approved under [the Act].” 25 U.S.C. 2713(a). In addition, IGRA requires that the Commission, by regulation, provide an opportunity for an appeal and a hearing before the Commission on fines levied by the Chair. 25 U.S.C.

2713(a)(2). Tribes and management contractors also have a right to a hearing before the Commission to determine whether a temporary closure order issued by the Chair should be made permanent or dissolved. 25 U.S.C. 2713(b).

Rules for appeal proceedings before the Commission were previously found in three separate parts of this chapter: part 524 governing appeals of ordinance disapprovals; part 539 governing appeals of management contract approvals or disapprovals; and part 577 governing appeals of enforcement actions and actions to void an approved management contract. The purposes of this new subchapter are to consolidate all appellate procedures in one place for clarity and efficiency, and to improve the overall appellate process.

II. Previous Rulemaking Activity

On November 18, 2010, the National Indian Gaming Commission (NIGC or Commission) issued a Notice of Inquiry and Notice of Consultation advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process that the NIGC should utilize to make revisions. 75 FR 70680, Nov. 18, 2010. On April 4, 2011, after holding eight consultations and reviewing all comments, the NIGC published a Notice of Regulatory Review Schedule setting out a consultation schedule and process for review. 76 FR 18457, April 4, 2011. Part 519 (Service), part 524 (Appeals), part 539 (Appeals), and part 577 (Appeals before the Commission) were included in this regulatory review. The Commission will address changes to part 519 (Service) in a separate rulemaking

action because part 519 sets forth rules for service of actions and decisions by the Chair and therefore does not implicate the appellate review process.

The Commission conducted additional consultations in conjunction with its review of these parts. Tribal consultations were held in every region of the country and were attended by tribal leaders or their representatives. In addition to the tribal consultations, on July 22, 2011, the Commission requested public comment on a Preliminary Draft of new Subchapter H. On January 31, 2012, the Commission published a Notice of Proposed Rulemaking, which proposed to create new Subchapter H (on February 16, 2012, the Commission published a Correction Notice to the NPRM which made several corrections to the preamble and regulatory text).

III. Review of Public Comments

In response to its Notice of Proposed Rulemaking, published on January 31, 2012, 77 FR 4720 (Correction Notice published on February 16, 2012, 77 FR 9179), the Commission received the following comments:

General Comments Applicable to the Entire Subchapter

Comment: Some commenters stated that they generally supported the creation of one subchapter on appeal proceedings, stating that these rules are much more accessible to the parties, provide certainty about the process, and appear to streamline and simplify the process. One of the commenters further stated that while these proposed rules will likely need refinement as they are implemented, they are a vast improvement to the current appeal proceeding rules. Two of the commenters stated that in the past, tribes have been held in limbo waiting for long periods of time for a decision on appeal, but that these rules address that concern by identifying clear timeframes for a decision.

Response: The Commission agrees that consolidating all appellate procedures into one subchapter provides greater clarity and efficiency, and that addressing certain issues that were not addressed in the prior regulations improves the overall appellate process.

Comment: A few commenters were concerned by what they deem to be the Commission's formal, overly rigid, and inflexible approach to hearing and deciding matters on appeal, which may burden the special government-to-government relationship between the Commission and tribes. One commenter was also concerned that the rules emphasize an adversarial appeals process. All three commenters suggested that the rules be re-drafted with a view towards a more informal and collaborative approach that gives due regard and respect for the sovereign authority of tribes, and encourages parties to reach an amicable resolution of a regulatory matter on appeal.

Response: The Commission understands the commenters' concerns that a rigid appeals process could impede a cooperative, government-to-government dialogue. However, the Commission had to consider how best to balance the desire for open, informal dialogue with the need to ensure that each tribe is afforded a fair, efficient, and transparent appellate process. Therefore, the Commission has elected not to adopt the suggested changes. The Commission believes, however, that the amendments improve a fair and efficient appellate process, accessible to all who choose to utilize it. Moreover, the Commission notes that nothing prevents the Commission and a party from reaching a mutually beneficial and amicable settlement of an administrative appeal.

Comment: Some commenters generally stated that the time periods for the filing of various motions and briefs in this subchapter are unreasonably short and should be re-

examined for reasonableness, with the Commission taking into consideration the time-consuming, internal decision processes that tribal governments and tribal agencies must follow, as well as the resource constraints in obtaining timely legal services. All three commenters suggested that the filing deadlines be increased, with two commenters providing specific suggestions: (i) filing deadlines for major decisions, such as whether to file a notice of appeal or motion for reconsideration, should be increased from 30 days to 60 days from the date of the Chair's decision; (ii) filing deadlines for appeal briefs should be increased from 15 days to 45 days after service of the record from the Commission; (iii) all other appellant responses should be increased from 10 days to 20 days after service of the submission; (iv) filing a motion to intervene by a third party should be increased from 10 days to 20 days; and (v) filing a reply brief in opposition to a motion to intervene should be increased from 5 days to 20 days. One commenter further stated that the suggested timeframes will help reduce the expense and inconvenience of processing numerous motions for extensions of time in the future.

Response: In light of these comments, the Commission reviewed the proposed filing deadlines and compared them with those of other federal agencies. In the interest of establishing and maintaining uniformity to the extent feasible with other appeals boards of the Department of the Interior's Office of Hearings and Appeals (OHA), such as the Interior Board of Indian Appeals (IBIA), the Commission modified certain deadlines, but not others, to be consistent with many of the OHA deadlines. Specifically:

(i) The Commission determined that the time period to file a notice of appeal or motion for reconsideration should remain at 30 days. This 30-day time period is consistent with the IBIA's deadline for the filing of notices of appeal.

(ii) The Commission modified the time period to file appeal briefs from 15 days to 30 days after service of the record, except for appeals before a presiding official, which shall remain at 10 days due to the short timeframe for commencing and completing the hearing. This 30-day time period is consistent with the IBIA's deadline for the filing of an appeal brief after the docketing of the appeal.

(iii) The Commission modified the time period to file a response or opposition brief from 10 days to 20 days, except for appeals before a presiding official, which shall remain at 10 days due to the short timeframe for commencing and completing the hearing.

(iv) The Commission determined that the time period to file motions to intervene or for limited participation shall remain at 10 days. The Commission believes that third party motions to intervene or participate should be made early in the appellate process so that the party that filed the appeal and the Commission know who is interested in participating in the appeal and the reasons why they are interested. Further, opposition briefs to such motions will remain at 10 days and reply briefs at 5 days. All parties benefit when the Commission makes a decision on these motions early in the appellate process. Finally, nothing prevents a third party from filing a motion for an extension of time to file either a motion to intervene or to participate, or a brief in opposition thereof.

(v) The Commission modified the time period to file objections to the presiding official's recommended decision from 10 days to 20 days, except that if the subject of the appeal is an order of temporary closure, the time period to file objections to the presiding official's recommended decision shall be 5 days due to the statutory

timeframe for issuing decisions on temporary closure orders after the conclusion of the hearing; and

(vi) The Commission determined that the time period to file most reply briefs is modified from 5 or 10 days to 15 days, except for appeals before a presiding official, which shall remain at 5 days due to the short timeframe for commencing and completing the hearing. This 15-day time period is consistent with the IBIA's deadline for the filing of reply briefs.

Comment: A few commenters stated that it is necessary for tribal governments to have knowledge of the facts underlying a decision before filing an appeal so that they can better assess the merits of the appeal in advance to make a fully informed decision of whether to appeal, and to be better equipped to prepare appeal briefs and motions. The commenters suggested that the appellants should have access to the full record prior to filing a notice of appeal in order to make a fully informed decision regarding whether or not to file a notice of appeal. To that end, one commenter recommended the addition of a generally applicable provision under which an appellant may request that the Commission disclose the record that formed the basis for an agency action before filing an appeal.

Response: The Commission disagrees. The Commission believes that it would be inefficient and a burden on agency resources to produce records for parties who have not appealed and may never appeal.

General Comments on Ex Parte Communications

In the Notice of Proposed Rulemaking, the Commission removed the *ex parte* communication prohibition rule, but nevertheless invited general comments on how to address *ex parte* communications.

Comment: Two commenters stated that a prohibition on *ex parte* communications should not serve as a barrier or impermissible restraint to the special government-to-government relationship between a tribal government and the Commission. Both commenters suggested that the prohibition on *ex parte* communications should only apply when the appeal proceeding involves both an appellant and an additional adverse party, other than the Chair, before a neutral arbiter. One commenter stated that it would be unreasonable for either the Chair or the tribal appellant to cease communicating with the Commission, and the other further stated that the lines of communication between tribal governments and the Commission should always remain open throughout the appeals process so that there is ample opportunity for the parties to engage in discussions, negotiations, and informal meetings.

Response: As set forth in the Notice of Proposed Rulemaking, the Commission explained that it removed the *ex parte* communication prohibition rule that appeared in the preliminary draft (circulated to tribes in advance of the NPRM) because several commenters expressed concern regarding the reach and application of the prohibition, as well as concerns that it could stifle otherwise lawful communications between the Commission and the tribes. Therefore, the prohibition is not part of these final rules. The Commission will consider issuing guidance on *ex parte* communications instead.

Comment: One commenter suggested that, should a prohibited *ex parte* communication occur, the Commission should allow for the preservation of the

communication on the record and service on adverse parties, as well as an opportunity for the adverse party to respond to the communication on the record.

Response: While an explicit prohibition on *ex parte* communications is not part of the final rules, the Commission agrees with the commenter that, should a prohibited *ex parte* communication occur, the Commission will follow the practice of preserving the communication on the record and serving it on the opposing party, as well as providing an opportunity for the opposing party to respond to the communication on the record.

580.1 What definitions apply?

Comment: Two commenters suggested a clearer and more precise definition of “presiding official” that addresses, at a minimum, the requirement that the presiding official be neutral and free from the direct supervision or control of the Commission, so that appellants are afforded a fair hearing consistent with due process principles.

Response: The Commission agrees with the commenters and has modified the definition accordingly.

580.2 When may the Commission waive its procedural rules governing appellate proceedings before the Commission?

Comment: A few commenters stated that the Commission’s standard for waiving its rules - “good cause” and “interest of justice” - are unnecessarily high and restrictive, albeit for different reasons. One commenter stated that tribal governments should not be required to show “good cause” if a waiver of the rules is necessary, but instead, the possibility of waiving the rules should always remain open as a viable option for every matter an appeal, and further stated that the Commission should remove the “interest of justice” standard. The second commenter noted that in no case may the time

for filing a notice of appeal be extended and sees no principled reason for the Commission to bind itself and future Commissions to these rigid rules. The third commenter stated that the “interest of justice” standard seems inappropriate given the Commission’s role as a civil regulatory agency, not a criminal enforcement agency. However, all three commenters suggested that waivers should be granted based on equitable considerations.

Response: In light of these comments, the Commission decided to define more clearly the standard to state “if the ends of justice so require and if to do so does not substantially prejudice any party.” This standard is in accordance with Supreme Court precedent regarding when an executive federal agency, regardless of whether it is a civil regulatory agency or a criminal enforcement agency, may exercise its discretion to relax or waive procedural rules that it adopted for the orderly transaction of business.

580.11 What if the Commission does not issue a majority decision?

Comment: Some commenters were concerned by the Commission’s proposal to designate the Chair’s decision as a final agency action in the absence of a majority decision by the Commission, as it results in the Chair being both the decision-maker of a matter and the exclusive adjudicator of whether or not his or her decision in that matter was correct. All three commenters stated that such an outcome deprives the appellant of his or her right to have a matter on appeal adjudicated by a fair and neutral decision-maker. Two commenters further stated that this result is contrary to what Congress intended in IGRA, and another commenter stated that such an outcome invites due process challenges. One of the commenters was disappointed by the decision to remove language that would have affirmed the presiding official’s recommended decision as final

agency action in the absence of a majority decision, and stated that it is patently unfair to favor the Chair's disputed decision over a recommended decision issued by a neutral arbiter. This commenter suggested that the Commission reinstate the provision allowing a presiding official's recommended decision to become a final agency action if the Commission is unable to reach a majority decision. Another commenter suggested that the Commission carefully consider the due process implications and draft this rule appropriately.

Response: IGRA mandates that Commission agency decisions shall be made or adopted by either the Chair or the Commission as a whole, and not by a presiding official who has not been appointed to serve on the Commission and would not otherwise be accountable for such an agency decision. Therefore, the Commission is statutorily prohibited from making the recommended change.

In addition, the Commission explained in the preamble to the NPRM that it removed the provision allowing the presiding official's recommended decision to become final agency action in the absence of a Commission majority decision because the recommended decision is, by definition, a recommendation. Further, this provision already exists in the rules governing management contracts, and for consistency, the Commission determined to have the same provision apply to all appeals.

581.5 How do I file a motion to supplement the record?

Comment: One commenter suggested that the language in § 581.5 should be similar to the provision in § 584.8 of this subchapter with respect to supplementation of the record in proceedings before a presiding official.

Response: Regarding the suggested language change, § 584.8 of this subchapter governs hearings before a presiding official and provides that the parties may make additional submissions to the record after the hearing and before the presiding official closes the record. Presiding officials provide recommended decisions for the Commission’s consideration, which the Commission either affirms or reverses, in whole or in part. It is essential that the Commission refrain from setting a closing date for the record similar to the provision in § 584.8 to ensure that the Commission considers all relevant evidence prior to issuing its final decision. The Commission thus declines to make the suggested language change.

Comment: To avoid substantial uncertainty regarding the amount of time available to a potential appellant to submit additional materials while the record is still open, one commenter suggested that this section be revised to provide clarity as to when the record is deemed closed for the Commission to begin their decision-making process.

Response: Regarding the timing of the closing of the record, the Commission states that the record is open until the Commission issues a final agency decision because it is paramount that the Commission, the final arbiter, makes its decision on as complete a record as possible.

581.6 How do I file a motion for reconsideration?

Comment: Some commenters had concerns about the “extraordinary circumstances” standard for granting a motion for reconsideration. One commenter stated that the rule implies that motions for reconsideration will be considered rare exceptions rather than the norm. Another commenter stated that such a high and relatively unattainable standard for reconsiderations is contrary to the overall objective of

the appeals process, which should be to achieve an amicable resolution of a regulatory issue, and should not be adversarial. One commenter stated that this standard unnecessarily restricts a tribe's ability to work with the Commission in reaching an agreeable solution after a final decision has been issued and another commenter stated that this standard hinders opportunities for the Commission to continue the dialogue with an appellant tribe after a final decision has been issued. All three commenters suggested that the Commission remove the "extraordinary circumstances" standard to ensure that any party can file a motion for reconsideration without limitation as to the circumstances giving rise to the motion.

Response: The Commission agrees in part, and disagrees in part. In federal courts, motions for reconsideration are "disfavored" and are granted only to correct manifest errors in law or fact or to present newly discovered evidence. Other federal executive agencies have also codified these legal standards into their regulations. For example, the U.S. Merit Systems Protection Board will grant a petition for review of an appellate decision only when a party has established that: "(1) [n]ew and material evidence is available that, despite due diligence, was not available when the record closed; or (2) [t]he decision of the judge is based on an erroneous interpretation of statute or regulation." 5 CFR 1201.115. Therefore, the Commission disagrees that parties should be able to file motions for reconsideration without any limitation.

Nonetheless, in light of the comments received, the Commission has removed the term "extraordinary circumstances" and replaced it with defined legal standards. As noted above, these standards are based on both federal court practice and that of other

federal executive agencies. A moving party must meet any one of these three standards for a motion for reconsideration to be sustained.

Further, administrative appeals are a form of litigation and are adversarial. Nothing, however, prevents the Chair and a party from reaching a mutually beneficial settlement of an administrative appeal.

Comment: One commenter stated that the 30-day timeframe for filing a motion for reconsideration may be problematic because the Commission fails to take into account the long-term and ongoing nature of some enforcement matters such as civil fine assessments, the payment of which may be made in installments over time. The commenter suggested that the proposed rule not limit the ability of the tribal government and the Commission to modify that dispute-specific relationship as new facts or arguments come to light, even after the 30-day timeframe has expired.

Response: The Commission considered this comment and concluded that the filing deadline for motions for reconsideration does not affect the imposition and ongoing payments of civil fine assessments. Once a civil fine has been appealed to the Commission, the Commission may, at any time after the appellate process has concluded and the civil fine has become final agency action, exercise its discretion to reconsider the continued payment and/or reduction of civil fine payments if a petition for such action is submitted to the Commission.

584.6 When will the hearing be held?

Comment: A commenter noted that there is a potential for an overlap between the time a presiding official is designated and the deadline for concluding the hearing in temporary closure order appeals. In the interest of ensuring that the presiding official can

conduct a full and fair hearing, the commenter suggested that the timeframe for designating a presiding official should be much shorter for appeals involving temporary closure orders, requiring the Commission to appoint a presiding official within five to seven days after a timely notice of appeal is filed.

Response: Many of the presiding officials participating in Commission appeals are designated by the Department of the Interior’s Office of Hearings and Appeals (OHA). When an appeal hearing concerns a temporary closure order, the Commission will request that OHA quickly designate a presiding official so that the appeal hearing may be commenced and concluded within the timeframes set forth in these rules.

Comment: A commenter requested clarification on whether there is any language that allows the parties or the entity that is making the appeal to recommend or object to the selection of the presiding official, and suggested that parties should be given an opportunity to make recommendations or objections on the selection of the presiding official because certain individuals have very limited gaming experience.

Response: The Commission disagrees. Pursuant to other comments, the Commission has modified the definition of “presiding official” to state clearly that a presiding official “shall not be under the direct control or supervision of the Commission, nor subject to influence by the Chair or the Commission.” Similarly, the Commission believes that presiding officials should not be subject to the approval of parties to the appeal, regardless of the extent of their gaming experience.

584.8 What is the hearing process?

Comment: A commenter suggested that the Commission allow parties to supplement the record at any time prior to the issuance of the Commission’s final decision.

Response: The Commission agrees. Parties may move to supplement the record under § 581.5, which provides that a party may file a motion for leave to submit additional evidence at any time prior to issuance of a final decision by the Commission.

The Commission has added two provisions to proposed § 584.8 (c) that shorten filing deadlines in temporary closure order cases to comply with the statutory requirement that the Commission issue decisions in these cases within 60 days of the conclusion of a hearing. Thus, § 584.8 (c) now provides that if the subject of the appeal is an order of temporary closure, the record will be kept open for a maximum of 10 days, rather than “a reasonable period of time” as provided for in all other matters. In addition, § 584.8 (c) also now provides that in temporary closure order matters, the presiding official shall issue a recommended decision within 20 days after the record closes.

584.10 What is the process for pursuing settlement or a consent decree?

Comment: A few commenters stated that this rule could be construed as limiting the period during which parties to an appeal proceeding may pursue settlement or a consent decree once the “five days before the date scheduled for hearing” deadline has passed. These commenters thus suggested that this section be clarified to expressly allow parties to negotiate the terms of a potential settlement agreement at any time during the appeal proceeding.

Response: This rule is intended to set a time limit for the parties to move jointly to defer a hearing before a presiding official so that the parties may enter negotiations for

a settlement. Parties may engage in settlement negotiations at all times; however, if the parties wish to defer a hearing before a presiding official to engage in settlement negotiations, they must do so at least five days before the date scheduled for hearing.

585.7 When will the Commission issue its decision?

The Commission changed § 585.7 to shorten the time within which it will issue its decision in temporary closure order matters from 60 days to 30 days. The temporary closure of a tribe's casino is a very serious consequence, and the Commission believes that such matters should be resolved expeditiously. In addition, if this timeframe is not shortened, then temporary closure order cases on written submission could take longer than temporary closure order cases that go to a hearing. Therefore, if the subject of the appeal is whether to dissolve or make permanent a temporary closure order, the Commission shall issue its decision within 30 days of the conclusion of briefing by the parties.

Regulatory Matters

Regulatory Flexibility Act

The rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Moreover, Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an annual effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for

consumers, individual industries, federal, state, or local government agencies or geographic regions. Nor will the rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act. 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that this rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

National Environmental Policy Act

The Commission has determined that this rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

Paperwork Reduction Act

This proposed rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, and is therefore not subject to review by the Office of Management and Budget.

List of Subjects

25 CFR Parts 524, 539, and 577

Administrative practice and procedure, Gambling, Indian-lands, Reporting and recordkeeping requirements.

25 CFR Parts 580, 581, 582, 583, 584, and 585

Appeals, Gambling, Indian-lands.

For the reasons stated in the preamble, and under the authority of the Indian Gaming Regulatory Act, 25 U.S.C. 2701-2712, the Commission removes 25 CFR parts 524, 539, and 577, and adds subchapter H, consisting of parts 580 through 585, to 25 CFR chapter III as follows:

PART 524—[REMOVED]

1. Remove part 524.

PART 539—[REMOVED]

2. Remove part 539.

PART 577—[REMOVED]

3. Remove part 577.
4. Add subchapter H, consisting of parts 580 through 585 to read as follows:

Subchapter H – Appeal Proceedings before the Commission

PART 580 – RULES OF GENERAL APPLICATION IN APPEAL PROCEEDINGS
BEFORE THE COMMISSION

PART 581 – MOTIONS IN APPEAL PROCEEDINGS BEFORE THE COMMISSION

PART 582 – APPEALS OF DISAPPROVALS OF GAMING ORDINANCES,
RESOLUTIONS, OR AMENDMENTS

PART 583 – APPEALS FROM APPROVALS OR DISAPPROVALS OF
MANAGEMENT CONTRACTS OR AMENDMENTS TO MANAGEMENT
CONTRACTS

PART 584 – APPEALS BEFORE A PRESIDING OFFICIAL OF NOTICES OF
VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF
TEMPORARY CLOSURE, THE CHAIR’S DECISIONS TO VOID OR MODIFY
MANAGEMENT CONTRACTS, THE COMMISSION’S PROPOSALS TO REMOVE
A CERTIFICATE OF SELF-REGULATION, AND NOTICES OF LATE FEES AND
LATE FEE ASSESSMENTS

PART 585 – APPEALS TO THE COMMISSION ON WRITTEN SUBMISSIONS OF
NOTICES OF VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF
TEMPORARY CLOSURE, THE CHAIR’S DECISIONS TO VOID OR MODIFY
MANAGEMENT CONTRACTS, THE COMMISSION’S PROPOSALS TO REMOVE
A CERTIFICATE OF SELF-REGULATION, AND NOTICES OF LATE FEES AND
LATE FEE ASSESSMENTS

**Part 580 – RULES OF GENERAL APPLICATION IN APPEAL PROCEEDINGS
BEFORE THE COMMISSION**

Sec.

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580.9 What is the effective date of the Commission's final decision?

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580.11 What if the Commission does not issue a majority decision?

580.12 Does an appeal of a Chair's decision stay the effect of that decision?

Authority: 25 U.S.C. 2706, 2713, 2715.

§ 580.1 What definitions apply?

The following definitions apply to this subchapter:

Day: A calendar day.

De novo review: A standard of review where the Commission reviews the matter anew, as if it had not been reviewed by the Chair.

Limited participant: A party who successfully petitions the Commission to participate on a limited basis in an ordinance appeal under § 582.5 of this subchapter.

Preponderance of the evidence: The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

Presiding official: The individual who presides over the hearing and issues the recommended decision under part 584. This individual shall not be under the direct control or supervision of the Commission, nor subject to influence by the Chair or the Commission.

Proceeding: All or part of an appeal heard by a presiding official or the Commission, and decided by the Commission.

Summary proceeding: Ordinance appeals and management contract and amendment appeals are summary proceedings.

§ 580.2 When may the Commission waive its procedural rules governing appellate proceedings before the Commission?

The procedural provisions of parts 580 through 585 of this subchapter may be waived, in whole or in part, to promote the orderly conduct of business on motion to the Commission or on its own motion, if the ends of justice so require and if to do so does not substantially prejudice any party, except that the Commission may not extend the time for filing a notice of appeal.

§ 580.3 Who may appear before the Commission?

In any appellate proceeding under parts 582 through 585 of this subchapter, a party or limited participant may appear in person or by an attorney or other authorized representative. An attorney must be in good standing and admitted to practice before any Court of the United States, the District of Columbia, any tribal court, or the highest court of any state, territory, or possession of the United States. Any person appearing as an attorney or authorized representative shall file with the Commission a written notice of appearance. The notice must state his or her name, address, telephone number, facsimile number, email address, if any, and the name and address of the person or entity on whose behalf he or she appears.

§ 580.4 How do I effect service?

(a) An appellant shall serve its notice of appeal on the Commission at the address indicated in the decision or notice that is the subject of the appeal.

(b) Copies of the notice of appeal shall be filed personally or by registered or certified mail, return receipt requested. All subsequent documents shall be served

personally, by facsimile, by e-mail to an address designated by a Commission employee, or by first class mail. In matters where a hearing has been requested, all filings shall be made with the Commission until a presiding official is designated and the parties are so notified, after which all filings shall be made with the presiding official.

(c) All documents filed after the notice of appeal shall be served on the Commission and copies concurrently served on all parties, intervenors, or limited participants.

(d) Service of copies of all documents is complete at the time of personal service or, if service is made by mail, facsimile, or email, upon transmittal.

(e) When a representative (including an attorney) has entered an appearance for a party, limited participant, or intervenor in a proceeding initiated under any provision of parts 582 through 585 of this subchapter, service thereafter shall be made upon the representative.

(f) The Commission may extend the time for filing or serving any document, except a notice of appeal.

(1) A request for an extension of time must be filed within the time originally allowed for filing.

(2) For good cause, the Commission may grant an extension of time on its own motion.

(g) Rules governing service of documents by the Chair or Commission are governed by part 519 of this chapter.

§ 580.5 What happens if I file late or fail to file?

(a) Failure to file an appeal within the time provided shall result in a waiver of the right to appeal.

(b) Failure to meet any deadline for the filing of any motion or response thereto shall result in a waiver of the right to file.

§ 580.6 How is time computed?

In computing any period of time prescribed for filing and serving a document, the first day of the period so computed shall not be included. The last day shall be included unless it falls on a Saturday, Sunday, or Federal legal holiday, in which case the period shall run until the end of the next business day. Except for appeals of temporary closure orders, when the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal federal holidays shall be excluded in the computation.

§ 580.7 What is the burden of proof and standard of review?

(a) The Chair bears the burden of proof to support his or her action or decision by a preponderance of the evidence.

(b) The Commission shall review the Chair's actions or decisions *de novo*.

§ 580.8 What will the Commission's final decision contain?

The Commission may affirm, modify, or reverse, in whole or in part, the Chair's decision or the presiding official's recommended decision, or may remove a certificate of self-regulation, and will state the bases of its decision. The final decision will be in writing and will include:

(a) A statement of findings and conclusions, with the bases for them on all material issues of fact, law, or discretion;

(b) A ruling on each material issue; and

(c) An appropriate grant or denial of relief.

§ 580.9 What is the effective date of the Commission's final decision?

The Commission's final decision is effective immediately unless the Commission provides otherwise in the decision.

§ 580.10 Is the Commission's decision a final agency action?

The Commission's final decision is a final agency action for purposes of judicial review.

§ 580.11 What if the Commission does not issue a majority decision?

In the absence of a decision of a majority of the Commission within the time provided, the Chair's decision shall constitute the final decision of the Commission, except that if the subject of the appeal is a temporary closure order, the order shall be dissolved.

§ 580.12 Does an appeal of a Chair's decision stay the effect of that decision?

Except as otherwise provided by NIGC regulations at 25 CFR 522.5 and 522.7, the filing of an appeal does not stay the effect of the Chair's decision. The appellant must comply with the Chair's decision pending the outcome of the appeal.

Part 581 – MOTIONS IN APPEAL PROCEEDINGS BEFORE THE COMMISSION

Sec.

581.1 What is the scope of this part?

581.2 How does an entity other than a tribe request to participate on a limited basis in an ordinance appeal?

581.3 How do I file a motion to intervene in appeals?

581.4 How do I file a motion before a presiding official?

581.5 How do I file a motion to supplement the record?

581.6 How do I file a motion for reconsideration?

Authority: 25 U.S.C. 2706, 2713, 2715.

§ 581.1 What is the scope of this part?

(a) This part governs motion practice under:

(1) Part 582 of this subchapter relating to appeals of disapprovals of gaming ordinances, resolutions, or amendments;

(2) Part 583 of this subchapter relating to appeals of the approval or disapproval of management contracts or amendments to a management contract;

(3) Part 584 of this subchapter relating to appeals before a presiding official of notices of violation, orders of temporary closure, proposed civil fine assessments, the Chair's decisions to void or modify management contracts, the Commission's proposals to remove certificates of self-regulation, and notices of late fees and late fee assessments; and

(4) Part 585 of this subchapter relating to appeals to the Commission on written submissions of notices of violation, orders of temporary closure, proposed civil fine assessments, the Chair's decisions to void or modify management contracts, the Commission's proposals to remove certificates of self-regulation, and notices of late fees and late fee assessments.

(b) This part also governs motion practice in hearings under § 535.3 of this subchapter to review the Chair's decision to void or modify a management contract.

§ 581.2 How does an entity other than a tribe request to participate on a limited basis in an ordinance appeal?

Requests for limited participation in ordinance appeals are governed by § 582.5 of this subchapter.

§ 581.3 How do I file a motion to intervene in appeals?

Motions to intervene in appeals before a presiding official are governed by § 584.5 of this subchapter. Motions to intervene in appeals before the Commission are governed by § 585.5 of this subchapter.

§ 581.4 How do I file a motion before a presiding official?

Motion practice before a presiding official on appeals of notices of violation, orders of temporary closure, proposed civil fine assessments, the Chair's decisions to void or modify management contracts, the Commission's proposals to remove certificates of self-regulation, and notices of late fees and late fee assessments is governed by § 584.4 of this subchapter.

§ 581.5 How do I file a motion to supplement the record?

Upon its own motion or the motion of a party, the Commission may allow the submission of additional evidence. A party may file a motion for leave to submit additional evidence at any time prior to issuance of a final decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to previously submit such evidence. The Commission may adjust its time for issuing a final decision accordingly, unless the subject of the appeal is a temporary closure order.

§ 581.6 How do I file a motion for reconsideration?

(a) Motions for reconsideration may be made only for final decisions on appeal and will only be granted if a party can establish that:

(1) New and material evidence is now available that, despite the party's due diligence, was not available when the record closed;

(2) The final decision was based on an erroneous interpretation of law or there has been an intervening change in the controlling law; or

(3) A manifest injustice, clearly apparent or obvious on its face, will occur if the motion for reconsideration is not granted.

(b) A motion for reconsideration and accompanying brief shall be filed within 30 days of the date of the Commission's final decision and shall be served on all parties, limited participants, and intervenors, if any. A motion for reconsideration shall explain the circumstances requiring reconsideration.

(c) A party may file only one motion and accompanying brief for reconsideration.

(d) Opposition briefs shall be filed within 20 days after the motion is filed.

(e) A reply brief to the brief in opposition shall be filed within 15 days of service of the brief in opposition.

(f) The Commission shall issue a decision on reconsideration within 30 days of the filing of the reply brief or of the expiration of the time to file a reply brief, whichever is later. The Commission shall issue a brief statement of the reason(s) for its decision.

(g) If the Commission grants the motion, it may reverse or modify the decision, in whole or in part, from which reconsideration is sought or may remand to the Chair for further consideration.

(h) The filing of a motion for reconsideration will not stay the effect of any decision or order and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Commission.

Part 582 – APPEALS OF DISAPPROVALS OF GAMING ORDINANCES, RESOLUTIONS, OR AMENDMENTS

Sec.

582.1 What does this part cover?

582.2 Who may appeal the disapproval of a gaming ordinance?

582.3 How do I appeal the disapproval of a gaming ordinance?

582.4 Are motions permitted?

582.5 How does an entity other than a tribe request to participate on a limited basis?

582.6 When will I receive a copy of the record on which the Chair relied?

582.7 When will the Commission issue its final decision?

Authority: 25 U.S.C. 2706, 2710, 2713, 2715.

§ 582.1 What does this part cover?

This part applies to appeals from the Chair’s decision to disapprove a gaming ordinance, resolution, or amendment thereto under part 522 of this chapter.

§ 582.2 Who may appeal the disapproval of a gaming ordinance?

Only the tribe whose gaming ordinance, resolution, or amendment thereto is disapproved by the Chair may appeal.

§ 582.3 How do I appeal the disapproval of a gaming ordinance?

Within 30 days after the Chair serves his or her disapproval, the appellant must file with the Commission a notice of appeal. The notice of appeal must reference the decision from which the appeal is taken. Unless the Commission has extended the time for filing an appeal brief pursuant to § 580.4(f) of this subchapter, the appeal brief must be filed within 30 days of service of the record pursuant to § 582.6. The appeal brief

shall state succinctly why the appellant believes the Chair's disapproval should be reversed and may include supporting documentation.

§ 582.4 Are motions permitted?

Ordinance appeals are summary proceedings. Only motions for extension of time under § 580.4(f) of this subchapter, motions for limited participation under § 582.5, motions to supplement the record under § 581.5 of this subchapter, and motions for reconsideration under § 581.6 of this subchapter, are permitted.

§ 582.5 How does an entity other than a tribe request to participate on a limited basis?

(a) An individual, whether acting on his or her own behalf or as an agent of an entity, or an entity other than the tribe identified in § 582.2, may request to participate in an appeal of an ordinance disapproval on a limited basis by filing a submission with the Commission within 10 days of the filing of the notice of appeal.

(b) The submission may contain supporting documentation, and shall state:

(1) The individual's or entity's property, financial, or other interest at stake in the proceeding; and

(2) The reason(s) why the Chair's decision should be upheld or reversed. The submission shall address the ordinance requirements under §§ 522.4, 522.5, 522.6, and 522.7 of this chapter.

(c) The submission shall be served concurrently on the tribe consistent with § 580.4 of this subchapter. Failure to properly serve the tribe may be a basis for denying limited participation.

(d) Within 10 days after service of the submission, any party to the appeal may file a brief and supporting material in response to the submission.

(e) Within 10 days of the filing of a response pursuant to paragraph (d) of this section, the Commission will notify the submitter in writing of its decision whether to accept and consider the submission and will state the basis for its decision, which it shall serve on the individual or entity and the tribe.

§ 582.6 When will I receive a copy of the record on which the Chair relied?

Within 10 days of the filing of a notice of appeal, or as soon thereafter as practicable, the record on which the Chair relied will be transmitted to the tribe.

§ 582.7 When will the Commission issue its final decision?

(a) Within 90 days after it receives the appeal brief or within 90 days of its ruling on a request for limited participation brought under § 582.5 or within 90 days of the conclusion of briefing by all parties, whichever is later, the Commission shall issue its final decision.

(b) The Commission shall notify the tribe and any limited participant of its final decision and the reason(s) supporting it.

**Part 583 – APPEALS FROM APPROVALS OR DISAPPROVALS OF
MANAGEMENT CONTRACTS OR AMENDMENTS TO MANAGEMENT
CONTRACTS**

Sec.

583.1 What does this part cover?

583.2 Who may appeal the approval or disapproval of a management contract or amendment to a management contract?

583.3 How do I appeal the approval or disapproval of a management contract or amendment to a management contract?

583.4 Are motions permitted?

583.5 When will I receive a copy of the record on which the Chair relied?

583.6 When will the Commission issue its final decision?

Authority: 25 U.S.C. 2706, 2711, 2712, 2713, 2715.

§ 583.1 What does this part cover?

This part applies to appeals from the Chair's decision to approve or disapprove a management contract or amendment to a management contract under parts 533 and 535 of this chapter.

§ 583.2 Who may appeal the approval or disapproval of a management contract or amendment to a management contract?

Only a party to the management contract or amendment thereto approved or disapproved by the Chair may appeal.

§ 583.3 How do I appeal the approval or disapproval of a management contract or amendment to a management contract?

(a) Within 30 days after the Chair serves his or her determination, the appellant must file a notice of appeal with the Commission and serve it on all parties to the management contract. The notice of appeal must reference the decision from which the appeal is taken. Unless the Commission has extended the time for filing an appeal brief pursuant to § 580.4(f) of this subchapter, the appeal brief must be filed within 30 days of service of the record pursuant to § 583.5. The brief shall state succinctly why the appellant believes the Chair's approval or disapproval should be reversed and may include supporting documentation.

(b) Another party to the management contract may oppose the appeal by filing an opposition brief with the Commission within 20 days after service of the appellant's

brief. The opposition brief shall state succinctly why the party believes the Chair's approval or disapproval should be upheld and may include supporting documentation.

(c) The appellant may file a reply brief within 15 days of service of the opposition brief.

§ 583.4 Are motions permitted?

Management contract and amendment appeals are summary proceedings. Only motions for an extension of time under § 580.4(f) of this subchapter, motions to supplement the record under § 581.5 of this subchapter, and motions for reconsideration under § 581.6 of this subchapter, are permitted.

§ 583.5 When will I receive a copy of the record on which the Chair relied?

Within 10 days of the filing of a notice of appeal, or as soon thereafter as practicable, the record will be transmitted to all parties.

§ 583.6 When will the Commission issue its final decision?

(a) The Commission shall issue its final decision within 90 days after service of the appeal brief or within 90 days after the conclusion of briefing by the parties, whichever is later.

(b) The Commission shall notify the tribe and management contractor of its final decision and the reason(s) supporting it.

Part 584 – APPEALS BEFORE A PRESIDING OFFICIAL OF NOTICES OF VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF TEMPORARY CLOSURE, THE CHAIR'S DECISIONS TO VOID OR MODIFY MANAGEMENT CONTRACTS, THE COMMISSION'S PROPOSALS TO REMOVE A CERTIFICATE OF SELF-REGULATION, AND NOTICES OF LATE FEES AND LATE FEE ASSESSMENTS

Sec.

584.1 What does this part cover?

584.2 Who may appeal?

584.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the Commission's proposal to remove a certificate of self-regulation, and a notice of late fees and late fee assessments?

584.4 Are motions permitted?

584.5 How do I file a motion to intervene?

584.6 When will the hearing be held?

584.7 When will I receive a copy of the record on which the Chair relied?

584.8 What is the hearing process?

584.9 How may I request to limit disclosure of confidential information?

584.10 What is the process for pursuing settlement or a consent decree?

584.11 Will the hearing be transcribed?

584.12 What happens after the hearing?

584.13 May I file an objection to the recommended decision?

584.14 When will the Commission issue its final decision?

Authority: 25 U.S.C. 2706, 2710, 2711, 2712, 2713, 2715, 2717.

§ 584.1 What does this part cover?

(a) This part applies to appeals of the following where the appellant elects a hearing before a presiding official:

(1) Violation(s) alleged in a notice of violation under § 573.3 of this chapter;

(2) Proposed civil fine assessments under part 575 of this chapter;

(3) Orders of temporary closure under § 573.4 of this chapter;

(4) The Chair's decision to void or modify a management contract under part 535 of this chapter subsequent to initial approval;

(5) The Commission's proposal to remove a certificate of self-regulation under part 518 of this chapter; and

(6) Late fee notifications and assessments under part 514 of this chapter.

(b) Appeals identified in paragraph (a) of this section brought directly before the Commission on the written record and without a hearing are filed pursuant to part 585 of this subchapter.

§ 584.2 Who may appeal?

(a) Appeals of notices of violation, proposed civil fine assessments, orders of temporary closure, proposals to remove certificates of self-regulation, and late fee notifications and assessments may only be brought by the tribe or the recipient of the action that is the subject of the appeal.

(b) Appeals of the Chair's decisions to void or modify a management contract after approval may only be brought by a party to the management contract.

§ 584.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the Commission's proposal to remove a certificate of self-regulation, and a notice of late fees and late fee assessments?

(a) Within 30 days after the Chair serves his or her action or decision, or the Commission serves its intent to remove a certificate of self-regulation, the appellant must file a notice of appeal with the Commission. The notice of appeal must reference the action or decision from which the appeal is taken.

(b) Within 10 days after filing the notice of appeal, the appellant shall file with the Commission:

(1) A list of the names of proposed witnesses who will present oral testimony at the hearing, the general nature of their expected testimony, and whether a closed hearing is requested and the reason(s) therefor; and

(2) A brief that states succinctly the relief sought and the ground(s) in support thereof, which may include supporting documentation and evidence in the form of affidavits.

(c) A party that has filed a notice of appeal may waive the right to an oral hearing before a presiding official and instead elect to have the matter determined by the Commission solely on the basis of written submissions. Appeals based on written submissions are governed by part 585 of this subchapter. If there is more than one party that has filed a notice of appeal, and any party that has filed a notice of appeal elects a hearing before a presiding official, the entire matter will proceed before a presiding official.

(d) The Chair may file a response brief and a list of the names of proposed witnesses who will present oral testimony at the hearing, the general nature of their expected testimony, and whether a closed hearing is requested and the reason(s) therefor, within 10 days after service of the appellate brief.

§ 584.4 Are motions permitted?

Yes. Motions to intervene under § 584.5 are permitted. Motions for an extension of time that are filed before the appointment of a presiding official shall be decided by the Commission. All other motions may be scheduled and heard at the discretion of the presiding official.

§ 584.5 How do I file a motion to intervene?

(a) An entity or an individual, whether acting on his or her own behalf or as an agent of another entity not permitted to appeal, may be permitted to participate as a party if the presiding official finds that:

(1) The final decision could directly and adversely affect it or the class it represents;

(2) The individual or entity may contribute materially to the disposition of the proceedings;

(3) The individual's or the entity's interest is not adequately represented by existing parties; and

(4) Intervention would not unfairly prejudice existing parties or delay resolution of the proceeding.

(b) A tribe with jurisdiction over the lands on which there is a gaming operation that is the subject of a proceeding under this part may intervene as a matter of right if the tribe is not already a party.

(c) A motion to intervene shall be submitted to the presiding official within 10 days of the notice of appeal. The motion shall be filed with the presiding official and served on each person who has been made a party at the time of filing. The motion shall state succinctly:

(1) The moving party's interest in the proceeding;

(2) How his or her participation as a party will contribute materially to the disposition of the proceeding;

(3) Who will appear for the moving party;

(4) The issues on which the moving party seeks to participate; and

(5) Whether the moving party seeks to present witnesses.

(d) Objections to the motion must be filed by any party within 10 days after service of the motion.

(e) A reply brief to the brief in opposition may be filed within 5 days of service of the brief in opposition.

(f) When motions to intervene are made by individuals or groups with common interests, the presiding official may request all such movants to designate a single representative, or he or she may recognize one or more movants.

(g) The presiding official shall give each movant and party written notice of his or her decision on the motion. For each motion granted, the presiding official shall provide a brief statement of the reason(s) for the decision. If the motion is denied, the presiding official shall briefly state the ground(s) for denial. The presiding official may allow the movant to participate as *amicus curiae*, if appropriate.

§ 584.6 When will the hearing be held?

(a) The Commission shall designate a presiding official who shall commence a hearing within 30 days after the Commission receives a timely notice of appeal. At the request of the appellant, the presiding official may waive the 30-day hearing requirement upon designation.

(b) If the subject of an appeal is whether an order of temporary closure should be made permanent or dissolved, the presiding official shall be designated within 7 days of the timely filing of the notice of appeal, and the hearing shall be concluded within 30 days after the Commission receives a timely notice of appeal, unless the appellant waives this right. Notwithstanding any other provision of this part, the presiding official shall

conduct such hearing in a manner that will enable him or her to conclude the hearing within the period required by this paragraph and consistent with any due process rights of the parties, including any period that the record is kept open following the hearing.

§ 584.7 When will I receive a copy of the record on which the Chair relied?

Within 10 days of the timely filing of a notice of appeal, or as soon thereafter as practicable, the record on which the Chair relied will be transmitted to the parties. In appeals dealing with temporary closure orders, the record will be transmitted within 5 days of the timely filing of a notice of appeal. Upon designation of the presiding official, the Commission shall transmit the agency record to the presiding official.

§ 584.8 What is the hearing process?

(a) Once designated by the Commission, the presiding official shall schedule the matter for hearing. The appellant may appear at the hearing personally, through counsel, or through an authorized representative consistent with the requirements of § 580.3 of this subchapter. The appellant, the Chair, and any intervenor shall have the right to introduce relevant written materials and to present an oral argument. At the discretion of the presiding official, a hearing under this section may include an opportunity to submit oral and documentary evidence and cross-examine witnesses.

(b) When holding a hearing under this part, the presiding official shall:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas authorized by the Commission;
- (3) Rule on offers of proof and receive relevant evidence;

(4) Authorize exchanges of information (including depositions and interrogatories in accordance with 25 CFR part 571, subpart C of this chapter) among the parties when to do so would expedite the proceeding;

(5) Establish and administer the course of the hearing;

(6) When appropriate, hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) At any conference held pursuant to paragraph (b)(6) of this section, require the attendance of at least one representative from each party who has authority to negotiate the resolution of issues in controversy;

(8) Dispose of procedural requests or similar matters;

(9) Recommend decisions in accordance with § 584.12; and

(10) Take other actions consistent with this part that are authorized by the Commission.

(c) The presiding official may order the record to be kept open for a reasonable period of time following the hearing (normally 10 days), during which time the parties may make additional submissions to the record, except that if the subject of the appeal is an order of temporary closure under § 573.4 of this chapter, the record will be kept open for a maximum of 10 days. Thereafter, the record shall be closed and the hearing shall be deemed concluded. Within 30 days after the record closes, the presiding official shall issue a recommended decision in accordance with § 584.12, except that if the subject of the appeal is an order of temporary closure under § 573.4 of this chapter, the presiding official shall issue a recommended decision within 20 days after the record closes.

§ 584.9 How may I request to limit disclosure of confidential information?

(a) If any person submitting a document in a proceeding claims that some or all of the information contained in that document is:

(1) Exempt from the mandatory public disclosure requirements under the Freedom of Information Act (5 U.S.C. 552);

(2) Information referred to in 18 U.S.C. 1905 (disclosure of confidential information); or

(3) Otherwise exempt by law from public disclosure, the person shall:

(i) Indicate that the whole document is exempt from disclosure or identify and segregate information within the document that is exempt from disclosure; and

(ii) Request that the presiding official not disclose such information to the parties to the proceeding (other than the Chair, whose actions regarding the disclosure of confidential information are governed by § 571.3 of this chapter) except pursuant to paragraph (b) of this section, and shall serve the request upon the parties to the proceeding. The request to the presiding official shall include:

(A) A copy of the document, group of documents, or segregable portions of the documents marked “Confidential Treatment Requested”; and

(B) A statement explaining why the information is confidential.

(b) If the presiding official determines that confidential treatment is not warranted with respect to all or any part of the information in question, the presiding official shall so inform all parties. The person requesting confidential treatment then shall be given an opportunity to withdraw the document before it is considered by the presiding official, or to disclose the information voluntarily to all parties.

(c) If the presiding official determines that confidential treatment is warranted, the presiding official shall so inform all parties.

(d) If the presiding official determines that confidential treatment is warranted, a party to a proceeding may request that the presiding official direct the person submitting the confidential information to provide that information to the party. The presiding official may so direct if the party requesting the information agrees under oath and in writing:

(1) Not to use or disclose the information except directly in connection with the hearing; and

(2) To return all copies of the information at the conclusion of the proceeding to the person submitting the information under paragraph (a) of this section.

(e) If a person submitting documents in a proceeding under this part does not claim confidentiality under paragraph (a) of this section, the presiding official may assume that there is no objection to disclosure of the document in its entirety.

(f) When a decision by a presiding official is based in whole or in part on evidence not included in the record, the decision shall so state, specifying the nature of the evidence and the provision of law under which disclosure was denied, and the evidence so considered shall be retained under seal as part of the official record.

§ 584.10 What is the process for pursuing settlement or a consent decree?

(a) General. At any time after the commencement of a proceeding, but at least 5 days before the date scheduled for hearing under § 584.6, the parties may jointly move to defer the hearing for a reasonable time to permit negotiation of a settlement or an

agreement containing findings and an order disposing of the whole or any part of the proceeding.

(b) Content. Any agreement containing consent findings and an order disposing of the whole or any part of a proceeding shall also provide:

(1) A waiver of any further procedural steps before the Commission;

(2) A waiver of any right to challenge or contest the validity of the order and decision entered into in accordance with the agreement; and

(3) The presiding official's certification of the findings and that the agreement shall constitute dismissal of the appeal and final agency action.

(c) Submission. Before the expiration of the time granted for negotiations, the parties or their authorized representatives may:

(1) Submit to the presiding official a proposed agreement containing consent findings and an order;

(2) Notify the presiding official that the parties have reached a full settlement or partial settlement and have agreed to dismissal of all or part of the action, subject to compliance with the terms of the settlement agreement; or

(3) Inform the presiding official that agreement cannot be reached.

(d) Disposition. In the event a full or partial settlement agreement containing consent findings and an order is submitted within the time granted, the presiding official shall certify such findings and agreement within 30 days after his or her receipt of the submission. Such certification shall constitute full or partial dismissal of the appeal, as applicable, and final agency action.

§ 584.11 Will the hearing be transcribed?

Yes. Hearings under this part that involve oral presentations shall be recorded verbatim and transcripts thereof shall be provided to parties upon request. Each party shall pay its own fees for transcripts.

§ 584.12 What happens after the hearing?

(a) Within 30 days after the record closes, the presiding official shall issue his or her recommended decision, except that if the subject of the appeal is an order of temporary closure under § 573.4 of this chapter, the presiding official shall issue a recommended decision within 20 days after the record closes.

(b) The recommended decision shall be in writing, based on the whole record, and include:

(1) Recommended findings of fact and conclusions of law upon each material issue of fact or law; and

(2) A recommended grant or denial of relief.

(c) The presiding official's recommended decision is reviewed by the Commission. The Commission issues the final decision.

§ 584.13 May I file an objection to the recommended decision?

Yes. Within 20 days after service of the presiding official's recommended decision, any party may file objections with the Commission to any aspect of the decision and the reasons therefore, unless the recommended decision is to dissolve or make permanent a temporary closure order issued under § 573.4 of this chapter, in which case objections to the recommended decision must be filed within 5 days after service of the recommended decision.

§ 584.14 When will the Commission issue its final decision?

(a) The Commission shall issue its final decision within 90 days after the date of the recommended decision or within 90 days after the date when objections to the recommended decision are filed or within 90 days after the conclusion of briefing by the parties, whichever comes later, unless the recommended decision is to dissolve or make permanent a temporary closure order issued under § 573.4 of this chapter, in which case the Commission shall issue its decision within 30 days of the recommended decision.

(b) The Commission shall serve its final decision upon the parties.

Part 585 - APPEALS TO THE COMMISSION ON WRITTEN SUBMISSIONS OF NOTICES OF VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF TEMPORARY CLOSURE, THE CHAIR'S DECISIONS TO VOID OR MODIFY MANAGEMENT CONTRACTS, THE COMMISSION'S PROPOSALS TO REMOVE A CERTIFICATE OF SELF-REGULATION, AND NOTICES OF LATE FEES AND LATE FEE ASSESSMENTS

Sec.

585.1 What does this part cover?

585.2 Who may appeal?

585.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the Commission's proposal to remove a certificate of self-regulation, and notices of late fees and late fee assessments?

585.4 Are motions permitted?

585.5 How do I file a motion to intervene?

585.6 When will I receive a copy of the record on which the Chair relied?

585.7 When will the Commission issue its decision?

Authority: 25 U.S.C. 2706, 2710, 2711, 2712, 2713, 2715, 2717.

§ 585.1 What does this part cover?

(a) This part applies to appeals of the following where the appellant does not elect a hearing before a presiding official and instead elects to have the matter decided by the Commission solely on the basis of the written submissions:

- (1) Violation(s) alleged in a notice of violation under § 573.3 of this chapter;
- (2) Proposed civil fine assessments under part 575 of this chapter;
- (3) Orders of temporary closure under § 573.4 of this chapter;
- (4) The Chair's decisions to void or modify a management contract under part 535 of this chapter subsequent to initial approval;
- (5) The Commission's proposals to remove a certificate of self-regulation under part 518 of this chapter; and
- (6) Late fee notifications and assessments under part 514 of this chapter.

(b) Appeals from these actions involving a hearing before a presiding official are brought under part 584 of this chapter.

§ 585.2 Who may appeal?

(a) Appeals of notices of violation, proposed civil fine assessments, orders of temporary closure, proposals to remove certificates of self-regulation, and late fee notifications and assessments may only be brought by the tribe or the recipient that is the subject of the action.

(b) Appeals of the Chair's decision to void or modify a management contract after approval may only be brought by a party to the management contract.

§ 585.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the

Commission's proposal to remove a certificate of self regulation, and notices of late fees and late fee assessments?

Within 30 days after the Chair serves his or her action or decision, or the Commission serves notice of its intent to remove a certificate of self-regulation, the appellant must file a notice of appeal with the Commission. The notice of appeal must reference the action or decision from which the appeal is taken and shall include a written waiver of the right to an oral hearing before a presiding official and an election to have the matter determined by the Commission solely on the basis of written submissions. Unless the Commission has extended the time for filing an appeal brief pursuant to § 580.4(f) of this subchapter, the appeal brief must be filed within 30 days of service of the record pursuant to § 585.6. The appeal brief shall state succinctly the relief sought and the supporting ground(s) therefor, and may include supporting documentation.

§ 585.4 Are motions permitted?

(a) Motions for extension of time under § 580.4(f) of this subchapter, motions to supplement the record under § 581.5 of this subchapter, motions to intervene under § 585.5, and motions for reconsideration under § 581.6 of this subchapter, are permitted. All other motions may be considered at the discretion of the Commission.

(b) The Chair shall not, either individually or through counsel, file or respond to motions.

§ 585.5 How do I file a motion to intervene?

(a) An entity or individual, whether acting on his or her own behalf or as an agent of another entity, not permitted to appeal, may be permitted to participate as a party to a pending appeal if the Commission finds that:

(1) The final decision could directly and adversely affect it or the class it represents;

(2) The individual or entity may contribute materially to the disposition of the proceedings;

(3) The individual's or entity's interest is not adequately represented by existing parties; and

(4) Intervention would not unfairly prejudice existing parties or delay resolution of the proceeding.

(b) A tribe with jurisdiction over the lands on which there is a gaming operation that is the subject of a proceeding under this part may intervene as a matter of right if the tribe is not already a party.

(c) A motion to intervene shall be submitted to the Commission within 10 days of the notice of appeal. The motion shall be filed with the Commission and served on each person who has been made a party at the time of filing. The motion shall succinctly state:

(1) The moving party's interest in the proceeding;

(2) How his or her participation as a party will contribute materially to the disposition of the proceeding;

(3) Who will appear for the moving party;

(4) The issues on which the moving party seeks to participate; and

(5) Whether the moving party seeks to present witness affidavits.

(d) Objections to the motion must be filed by any party within 10 days after service of the motion.

(e) A reply brief to the brief in opposition may be filed within 5 days of service of the brief in opposition.

(f) When motions to intervene are made by individuals or groups with common interests, the Commission may request all such movants to designate a single representative, or the Commission may recognize one or more movants.

(g) The Commission shall give each movant and party written notice of the decision on the motion. For each motion granted, the Commission shall provide a brief statement of the reason(s) for the decision. If the motion is denied, the Commission shall briefly state the ground(s) for denial. The Commission may allow the movant to participate as *amicus curiae*, if appropriate.

§ 585.6 When will I receive a copy of the record on which the Chair relied?

Within 10 days of the filing of a notice of appeal, or as soon thereafter as practicable, the record will be transmitted to the appellant.

§ 585.7 When will the Commission issue its decision?

(a) The Commission shall issue its decision within 90 days: after it receives the appeal brief; or its ruling on a request for intervention, if applicable; or after the conclusion of briefing by the parties, whichever comes later, unless the subject of the appeal is whether to dissolve or make permanent a temporary closure order issued under § 573.4 of this chapter, in which case, the Commission shall issue its decision within 30 days of conclusion of briefing by the parties.

(b) The Commission shall serve the final decision upon the appellants.

DATED: September 18____, 2012, Washington, DC.

Tracie L. Stevens,
Chairwoman

Steffani A. Cochran,
Vice-Chairwoman

Daniel J. Little,
Commissioner

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